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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS SILVA,

Defendant and Appellant.

D074640

(Super. Ct. No. SCE 369301)

APPEAL from a judgment of the Superior Court of San Diego County, Lantz Lewis, Judge. Affirmed.

Lizabeth Weis, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Jose Luis Silva appeals a judgment following his jury conviction of 14 sexual offenses committed against two minors.

## FACTUAL AND PROCEDURAL BACKGROUND

In 2017, an information was filed charging Silva with 14 counts of sexual offenses committed against minors, including: (1) three counts of lewd acts on M., a child under the age of 14 years, between September 13, 1998 and September 12, 2006 (Pen. Code, § 288, subd. (a),<sup>1</sup> counts 1-3); (2) five counts of lewd acts on A., a child under the age of 14 years, between September 19, 2008 and December 31, 2012 (§ 288, subd. (a), counts 4-8); (3) two counts of oral copulation by a person over the age of 21 years on A., a person under the age of 16 years, between January 1, 2013 and August 28, 2015 (former § 288a, subd. (b)(2), counts 9-10); (4) three counts of sodomy by a person over the age of 21 years on A., a person under the age of 14 years, between January 1, 2013 and August 28, 2015 (§ 286, subd. (b)(2), counts 11-13); and (5) one count of a lewd act on A., a child of the age of 14 or 15 years old, by a person at least 10 years older than the child, on August 29, 2015 (§ 288, subd. (c)(1), count 14). The information also alleged that in committing counts 1 through 3 Silva had substantial sexual conduct with M., a child under the age of 14 years (§ 1203.066, subd. (a)(8)) and that in committing count 14 he had substantial sexual conduct with A., a child under the age of 14 years (§ 288, subd. (c)(1)). Silva pleaded not guilty to the charges against him.

*Counts 1 through 3.* At a jury trial, M. testified that she was born in 1992 and was 25 years old at the time of trial. As a child, she was very close to her cousin, Iris, Silva's daughter. She and Iris played together two to four times per week and would sleep over

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<sup>1</sup> All statutory references are to the Penal Code.

at each other's house. Beginning when M. was six or seven years old, Silva would inappropriately touch her when she was at his house visiting Iris.

On the first occasion (count 1), M. was having a sleepover with Iris and was trying to climb onto the top bunk of a bunk bed. Silva came from behind her and held her as if he were going to help her up, but instead, he held her and dry humped her buttocks for a few minutes. He was wearing basketball shorts or boxers and no shirt. M. felt a bulge against her buttocks, knew what he was doing was not right, pulled away from him after a few minutes, and climbed onto the top bunk.

On another occasion when she was about nine years old (count 2), M. was in Silva's kitchen with her aunt and Iris. While they had their backs turned, Silva held M. in place against the back of a chair and humped her for a couple of minutes. He was wearing basketball shorts and no shirt. She could feel that his penis was hard. She was uncomfortable and was scared that her aunt and Iris would see it. She knew that what Silva was doing was wrong, but did not want Silva's family to break apart.

On another occasion when she was between 11 and 13 years old (count 3), M. had a sleepover with Iris at Silva's house. M. and Iris each slept on one of the couches. M. awoke to Silva stroking her leg. Silva told her that Iris was in the shower. M. was lying on her back, face up, when Silva laid on top of her, humped her with his hard penis, kissed her neck, and ran his hand over her body. He was wearing boxers and no shirt. He stopped after about five minutes when Iris turned off the shower. M. cried softly, but said nothing.

M. did not tell anyone about Silva's conduct until ninth grade, after it had stopped, and then she told her best friend about it. In 2010 or 2011, she told Iris in a Facebook message that Silva had sexually molested her. At that time, they did not discuss it further. However, in 2013 or 2014, M. and Iris met and discussed in more detail what Silva had done to M. In 2011 or 2012, M. also told her brothers and one of her brother's girlfriends about what Silva had done to her. In 2014, she also told her mother about it. When M. was contacted by law enforcement, she initially was unwilling to testify. However, after thinking about it for months, she decided to testify because she wanted Silva put in jail.

*Counts 4 through 14.* A. testified that he was born in 2000 and was 17 years old at the time of trial. Silva is A.'s uncle. M. and Iris are his cousins. On one occasion when A. was about eight years old (count 4), he was in Silva's bedroom when Silva touched and squeezed his butt cheeks over his clothes for a couple of minutes and then had him sit on his lap. A. felt scared and nervous because he did not think that was something people do. On another occasion (count 5), A. was watching soccer in Silva's bedroom when Silva touched his butt and then had him sit on his lap. On another occasion (count 6), Silva and A. were sitting on the couch in Silva's living room when Silva touched his butt. Although A. told him "no," Silva did not stop until A. pulled out his phone and threatened to call someone. On another occasion (count 7), A. was helping Silva move to a new house. While in the living room of the old house, Silva touched A.'s butt over his clothes and asked him why he had not seen him in a long time. Silva asked A. if he

remembered the "games" they used to play, which A. understood as referring to Silva's touching him with his hands or penis.

On another occasion when A. was about nine years old (count 8), Silva touched A.'s butt while they were talking in Silva's living room and they then went into the bathroom where Silva put his erect penis in A.'s mouth while A. was kneeling. Silva was wearing basketball shorts and no shirt and had pulled down his shorts. Silva stopped when his wife entered the house. On another occasion (count 9), Silva and A. were in Silva's bedroom in his new house when Silva put his penis in A.'s mouth and ejaculated. Afterward, A. ran to the bathroom and threw up. On another occasion (count 10), Silva and A. were in Silva's bedroom in his new house when Silva put his penis in A.'s mouth and then ejaculated onto the floor.

On another occasion (count 11), Silva and A. were in Silva's bedroom in his new house when Silva put a condom on his penis and inserted his penis into A.'s anus. When the condom got stuck, Silva ejaculated onto the floor. On another occasion (count 12), Silva and A. were in Silva's living room when Silva had A. lean over the armrest of the couch, inserted his penis into A.'s anus, and then asked A. if he could take a photograph of his penis inside of it. A. replied, "No. You're not doing that." Silva then stopped. On another occasion (count 13), Silva and A. were in Silva's laundry room when Silva inserted his penis into A.'s anus while he (A.) was up against the closed door.

On the final occasion (count 14), A., then 14 years old, was raking in the front yard when Silva approached him and asked where the septic tank was located. Silva then came up behind A. and squeezed his butt and asked if he could watch him work. A. said

"no," and told Silva to stop. A. stated, "This isn't right," referring to Silva touching him. Silva then left.

A. went inside his house and texted three of his friends about what had just happened. They urged him to tell his parents. A. called his mother at work and told her what Silva had just done and that Silva had been raping and molesting him for years. He was emotional and cried during the call. When his mother, father, and brother arrived home, A. told them only what had happened that day and not what had happened in the past. After his brother called the police, officers arrived to investigate. A. later spoke to a forensic interviewer at the Chadwick Center.

A forensic pediatrician testified that her examination of A. was normal and, absent physical findings, she could not conclude whether sexual abuse had occurred. A licensed clinical social worker testified about misconceptions regarding disclosure of child sexual abuse. Research shows that a vast majority of children who are victims of sexual abuse do not disclose that abuse immediately. Their reasons for not disclosing it earlier are feelings of shame or responsibility for the abuse, threats not to disclose the abuse, and the fear of not being believed. Victims may disclose their abuse immediately and in full detail, or incrementally with the full details initially withheld. Boys are less likely to disclose sexual abuse than girls.

Silva testified in his defense. He was 62 years old, married for 30 years, a recovering alcoholic, and suffered from heart problems. He denied being attracted to men or engaging in sexual activity with men. He denied the allegations of sexual abuse made by M. and A. Because of his pacemaker and heart condition, he was unable to

engage in sexual activity. Also, because of his medications, he was unable to have an erection.

Iris, Silva's daughter, also testified in his defense. She stated that A. never hung out with just her father. She never observed A. to be afraid of Silva. She could not recall M. sleeping over at her house. She stated that M. never told her that Silva had behaved inappropriately with her.

In rebuttal, the investigating detective testified that in August 2016 Iris declined to give him a statement, explaining that she "wanted to protect her father." When he interviewed Silva in August 2016, Silva admitted to having play boxed with A. and patting him on the bottom two or three times. Silva told the detective that M. had stayed overnight with Iris many times and said that he would normally hug and kiss M. on greeting her.

The jury found Silva guilty on all counts and found true all of the related allegations. The trial court sentenced him to a total term of 24 years in prison, consisting of a term of six years for count 8, seven consecutive terms of two years each for counts 1 through 7, and six consecutive terms of eight months each for counts 9 through 14. Silva timely filed a notice of appeal.

## DISCUSSION

Silva's appointed counsel has filed a brief summarizing the facts and procedures in the trial court. Counsel presents no argument for reversal of the judgment, but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738. To assist our review, counsel cites

*Anders v. California*, *supra*, 386 U.S. 738, and identifies the following possible, but not arguable, issues: (1) whether each conviction is supported by substantial evidence; (2) whether the court prejudicially erred by admitting expert testimony on child sexual abuse accommodation syndrome; (3) whether the court prejudicially erred by allowing the jury to consider the charged offenses, if found true beyond a reasonable doubt, to show Silva's propensity to commit such offenses and therefore as evidence of his guilt of the other charged offenses and by instructing the jury thereon with CALCRIM No. 1191B; (4) whether the court prejudicially erred by admitting the victims' statements under the fresh complaint doctrine; (5) whether the court prejudicially erred by not instructing on jury unanimity with CALCRIM No. 3502; and (6) whether section 801.1's statute of limitations bars Silva's convictions on counts 1, 2, and 3.

We granted Silva permission to file a supplemental brief on his own behalf. He submitted a six-page letter brief, written in Spanish. Pursuant to our request, Silva's appointed counsel provided us with an English translation of his brief. In his brief, Silva disputes the evidence presented by the prosecution and argues that M. and A. are not credible witnesses. He maintains that he is not guilty of the offenses of which he was convicted. To the extent that Silva asserts that there is insufficient evidence to support his convictions, we disagree and conclude that there is substantial evidence, as described above, to support his convictions. (*People v. Vines* (2011) 51 Cal.4th 830, 869; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) By citing only evidence that would have supported a contrary result at trial, he misconstrues and/or misapplies the substantial evidence standard of review. (*Vines*, at p. 869; *Johnson*, at p. 578.)



Our review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436 and *Anders v. California, supra*, 386 U.S. 738 has disclosed no reasonably arguable issues. Silva has been competently represented by counsel on this appeal.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.